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Determining Permissible Municipal Expenditures: The Public Purpose Doctrine Revived

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DETERMINING PERMISSIBLE MUNICIPAL EXPENDITURES: THE PUBLIC PURPOSE DOCTRINE REVIVED

An elementary premise of constitutional law is that public funds may be spent only for public purposes.[1] However there has never been, nor is there now, any precise standard or test for distinguishing public purposes from private purposes.[2] Courts have stated only general guidelines: municipalities may spend public money for purposes that are "a benefit to the community as a body"[3] or conducive to the "public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents"[4] of the community.[5] Judicial countermand of an authorized expenditure occurs only when the proposed use or purpose is "obviously of a private character,"[6] or it is "clearly apparent that [the municipality's determination] is without reason-

[1] Opinion to the Governor, 76 R.I. 249, 255, 69 A.2d 531, 534 (1949). *See also* The Liberty Bell, 23 F. 843 (1885); McLean v. City of Boston, 327 Mass. 118, 97 N.E.2d 542 (1951); Hays v. City of Kalamazoo, 316 Mich. 443, 25 N.W.2d 787 (1947); Skutt v. City of Grand Rapids, 275 Mich. 258, 266 N.W. 344 (1936); State *ex rel.* McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951); Webster v. Hopewell Borough, 19 Pa. Super. 549 (1902); Heimerl v. Ozaukee County, 256 Wis. 151, 40 N.W.2d 564 (1949). The mere fact that a private interest derives some benefit from the activity does not deprive the activity of its public nature if its primary purpose is public. Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958). *See also* Perez v. San Jose, 107 Cal. App. 2d 562, 237 P.2d 548 (1951); Roseville v. Tulley, 55 Cal. App. 2d 601, 131 P.2d 395 (1942); Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523 (1953); State *ex rel* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

[2] In Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523 (1953), the court stated, "Courts as a rule, instead of attempting judicially to define a public as distinguished from a private purpose, have left each case to be determined by its own peculiar circumstances." *Id.* at 15, 98 A.2d at 527. *See also* McSorley v. Fitzgerald, 359 Pa. 264, 59 A.2d 142 (1948); Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965); 2 E. McQUILLIN, MUNICIPAL CORPORATIONS §10.31 (3rd ed. rev. 1966); C. RHYNE, MUNICIPAL LAW 343 (1957).

[3] Port Authority of City of St. Paul v. Fisher, 269 Minn. 276, 288, 132 N.W.2d 183, 192 (1964).

[4] State *ex rel.* McClure v. Hagerman, 155 Ohio St. 320, 325, 98 N.E.2d 835, 838 (1951).

[5] An equally general test stated by McQuillin is "whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit." 15 E. McQUILLIN, MUNICIPAL CORPORATIONS § 39.19 (3rd ed. rev. 1970).

[6] Opinion to the Governor, 76 R.I. 249, 258, 69 A.2d 531, 535 (1949).

able foundation,"[7] or is "palpable [*sic*] and manifestly arbitrary and incorrect."[8]

Standards as vague as these allow municipalities considerable freedom in determining the propriety of their expenditures and the trend is to grant them even more.[9] The lack of precise standards makes it difficult for cities to determine the public or private character of expenditures they wish to make,[10] and makes any consistent and rational judicial review improbable when municipal determinations are tested in court.[11] Thus, assuming that the integrity of the well-accepted principle allowing only "public" expenditures[12] is to be maintained, the courts must formulate precise and workable standards for distinguishing public from private purposes. Judicially provided guidelines might inject some objectivity into an area of the law where it is presently lacking.[13]

This article surveys the criteria presently used by courts, commentators, and city officials in determining whether an expenditure of public funds is legally permissible.[14] Each factor is then reevaluated to ascertain its place in a new attempt to determine more consistently the nature of proposed expenditures.

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[7] City of Tulsa v. Williamson, 276 P.2d 209, 214 (Okla. 1954).

[8] State *ex rel.* McClure v. Hagerman, 155 Ohio St. 320, 325, 98 N.E.2d 835, 838 (1951).

[9] *See, e.g.*, Barnes v. City of New Haven, 140 Conn. 8, 15, 98 A.2d 523, 527 (1953): "The modern trend of authority is to expand and liberally construe the meaning of 'public purpose'." *See also* Ginsburg v. City and County of Denver, 164 Colo. 572, 436 P.2d 685 (1968); Gregory Marina, Inc. v. City of Detroit, 378 Mich. 364, 144 N.W.2d 503 (1966); Sommers v. City of Flint, 355 Mich. 655, 96 N.W.2d 119 (1959); State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951); Bland v. City of Taylor, 37 S.W.2d 291 (Tex. Civ. App. 1931), *aff'd sub nom.* Davis v. City of Taylor, 123 Tex. 39, 67 S.W.2d 1033 (1934).

[10] Interviews with officials in Michigan cities of various populations (Detroit, 1,511,482 people; Ann Arbor, 99,797; Jackson, 45,484; Albion, 12,112; and Brighton, 2,457. Data from U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS PC(1)-B24, Michigan (1970).) revealed that, although the frequency of the need to determine the permissibility of an expenditure varied (with cities of larger population having to confront the issue more frequently), all the cities canvassed must decide whether an expenditure is public or private and all confirm that the decision-making procedure is often unclear and that the standards used are seldom explicit. Interview with Mr. Burcham, City Treasurer of Albion, in Albion, Aug. 31, 1973; interview with Mr. Farris, Acting City Manager of Jackson, in Jackson, Aug. 29, 1973; interview with Mr. Romer, City Manager of Brighton, in Brighton, Aug. 30, 1973; interview with Mr. Sheehan, Assistant City Administrator of Ann Arbor, in Ann Arbor, Apr. 26, 1973; interview with Mr. Teague, Assistant Director of Bureau of the Budget of Detroit, in Detroit, Aug. 28, 1973 [hereinafter cited as Interviews].

[11] *See* notes 41-46 and accompanying text *infra*.

[12] *See* note 1 and accompanying text *supra*.

[13] The present status of the law in this area may be fairly characterized as determination or definition by illustration. *See, e.g.*, 15 E. MCQUILLIN, *supra* note 2, § 39, at 38-55, where 113 examples are given of what are and what are not public purposes. Such enumerations imply that other proper expenditures must be *ejusdem generis*. Until the characteristics that define the term "public purpose" are isolated, cities and courts will not be able to determine rationally the propriety of proposed expenditures.

[14] It should be noted that the public-private dichotomy is used in the analysis of other

I. CRITERIA TO DETERMINE THE NATURE OF PROPOSED MUNICIPAL EXPENDITURES

Six principal factors have been used by courts to determine whether a particular proposed expenditure is actually for a public rather than a private purpose. These factors are: prior characterization, legislative or voter approval, general economic benefit, competition with private enterprise, number of beneficiaries, and necessity because of infeasibility of private performance. Each factor and its application will be considered seriatim.

Prior characterization of a particular type of expenditure is frequently considered by cities, courts, and commentators in determining whether a similar proposed use of public money is for a public purpose. Thus under this standard, any purpose commonly thought of as "public" is a proper use for public funds. For instance, in *Commonwealth v. Gingrich,*[15] the court reinforced its doubts about the propriety of expenditures to entertain guests of the city by noting that the expenditures had never been approved.[16] Similarly, in *Allydonn Realty Corp. v. Holyoke Housing Authority,*[17] the court considered "whether a proposed extension of governmental activity is in line with the historical development of the Commonwealth."[18]

Some courts suggest that a formal declaration of approval by the municipal legislative organ[19] or by popular vote helps to determine whether an expenditure is public or private. Most courts applying this criterion will not invalidate an expenditure

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municipal problems. *E.g.*, use of eminent domain powers, Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905); governmental tort immunity, Hourigan v. City of Norwich, 77 Conn. 358, 59 A. 487 (1904); Quill v. Mayor of New York, 36 N.Y. App. Div. 476, 55 N.Y.S. 889 (1899); Conelly v. Nashville, 100 Tenn. 262, 46 S.W. 565 (1897); tax exemption for city-owned property, People v. Doe G. 1,034, 36 Cal. 220 (1868); People *ex rel.* Mayor v. Assessors, 111 N.Y. 505, 19 N.E. 90 (1888); Wharf Co. v. City of Galveston, 63 Tex. 14, (1884); and alienation of municipal property, Palmer v. City of Albequerque, 19 N.M. 285, 142 P. 929 (1914); Board of Educ. v. Edson, 18 Ohio St. 221 (1868). *See* Doddridge, *Distinction between Governmental and Proprietary Functions of Municipal Corporations,* 23 MICH. L. REV. 325 (1925), for a discussion of possible differences in result when the aim of the inquiry is different.

[15] 21 Pa. Super. 286 (1902).

[16] *Id.* at 290.

[17] 304 Mass. 288, 23 N.E.2d 665 (1939).

[18] *Id.* at 293, 23 N.E.2d at 668. *See also* Schieffelin v. Hylan, 236 N.Y. 254, 262, 140 N.E. 689, 691 (1923), where the court noted "widespread opinion and general practice" in considering expenditure for entertainment at a public celebration. Interviews with several Michigan city officials disclosed that past usage and prior court approval or disapproval of an expenditure is perhaps the single most important factor in their decisions as to the permissibility of an expenditure. Interviews, *supra* note 10.

[19] Opinion to the Governor, 76 R.I. 249, 258, 69 A.2d 531, 535 (1949):

> While the ultimate determination of the character of the use or purpose is a judicial and not a legislative question, yet where the legislature declares a particular use or purpose to be a "public use" such a declaration must be

after it has been approved by the municipal legislative body or the public without more substantial proof of the "private" nature of the expenditure than might be required otherwise.[20]

Another factor occasionally mentioned in determining the nature of a proposed expenditure is the general economic benefit to the city as a result of the expenditure.[21] If the resulting benefit is general and substantial, the expenditure is deemed one for a public purpose and therefore valid. The few courts which have explicitly applied this standard have usually stated that general economic improvement is not, in itself, sufficient to characterize an expenditure as public.[22] Yet, expenditures that seem to have little public character other than economic benefit are frequently approved.[23] These approvals indicate that the criterion of "economic benefit," although relatively infrequently discussed by

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given weight and will control unless the use or purpose in question is obviously of a private character.

See also Hightower v. City of Raleigh, 150 N.C. 569, 65 S.E. 279 (1909).

In an opinion concerning the permissibility of using public funds to defray expenses of a parade float representing Detroit at a Miami convention, the Detroit corporation counsel noted,

> "[A] legislative determination as to 'public purpose' or determination as to what is not a proper appropriation, is given great weight by the courts." 9 OP. DETROIT CORP. COUNSEL 93, 94 (1955).

[20] *Cf.* Lewis v. City of Fort Worth, 126 Tex. 458, 463, 89 S.W.2d 975, 978 (1936):

> [A] court has no right to substitute its judgment for the judgment and discretion of the governing body upon which the law visits the primary power and duty to act. Of course, if such governing body acts illegally, unreasonably, or arbitrarily, a court of competent jurisdiction may so adjudge, but there the power of the court ends.

[21] *Cf.* 15 E. MCQUILLIN, *supra* note 5.

[22] *See, e.g.*, State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957), where the city offered to purchase a building to be constructed by a company and to lease the building back to the company in order to induce the firm to locate in town. The court noted:

> It [the relocation of the company] may produce employment for citizens of the community. It may tend to balance a locally restricted economy. But general benefit to the economy of a community does not justify the use of public funds of the city unless it be for a public as distinguished from a private purpose.

Id. at 230, 82 N.W.2d at 274. *See also In re* Town of Woolley, 75 Wash. 206, 211, 134 P. 825, 827 (1913), where the court observed, "[A]dded trade was all that could come out of it, and stimulation of trade has never been held to be either a governmental or municipal function of cities and towns."

[23] For example, all of the following cases approve either bond financing arrangements to obtain or construct industrial facilities, or efforts to obtain or construct industrial facilities directly out of current revenues: Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Opinion of the Justices, 254 Ala. 506, 49 So. 2d 175 (1950); Hackler v. Baker, 233 Ark. 690, 346 S.W.2d 677 (1961); Roan v. Connecticut Industrial Building Comm., 150 Conn. 333, 189 A.2d 399 (1963); Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938); Roe v. Kervick, 42 N.J. 191, 199 A.2d 834 (1964); Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956); McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958); Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956); State *ex rel.* County Court v. Demus, 148 W. Va. 398, 135 S.E.2d 352 (1964).

courts, may be of major importance in the decision-making processes of courts and municipalities.

Cases also indicate that an expenditure is not for a public purpose if it results in municipal competition with private enterprise.[24] While the justification for this view is never clearly articulated by the courts, one possible reason for this limitation is the problem of unfair competition. Most medium-sized cities, if they were to engage in private enterprise, could exert considerable economic power.[25]

A fifth test applied by courts is whether the proposed expenditure benefits the citizenry as a whole, or benefits only a limited number of individuals or businesses. Under this test, the fewer the beneficiaries, the more "private" the purpose.[26]

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[24] *E.g.*, Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 293, 23 N.E.2d 665, 667-68 (1939), where the court considered "whether private enterprise has in the past failed or succeeded in supplying the want or in eradicating the evil." *See* Ferrie v. Sweeney, 34 Ohio 272, 72 N.E.2d 128 (1946), where a day care center operated by the city without regard to the financial ability of those who used it, was successfully challenged as constituting a convenience to those who needed no public help, and, as such, a private venture in competition with private enterprise. *See also* Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912), where public housing projects that did not qualify as "slum clearance" were successfully challenged. "The substance of [the project] is that the Commonwealth is to go into the business of furnishing homes for people who have money enough to pay rent and ultimately to become purchasers." *Id.* at 625, 98 N.E. at 612. In Brighton, Michigan, some expenditures have been considered, but disapproved principally because of supposed interference with local merchants. For example, the city contemplated purchasing plastic garbage bags and distributing them to its residents at no cost or at only a nominal charge. The project could have saved the city money in its refuse collection operations and improved the city's curbside appearance, but the plan was not approved. Competition with local merchants was cited as the reason. The Brighton City Manager suggested that smaller cities may afford this consideration more importance than do larger cities, because of the generally closer ties between city government and local merchants. Interviews, *supra* note 10. *Contra*, Barnes v. City of New Haven, 140 Conn. 8, 18, 98 A.2d 523, 529 (1953):

> That the authority's operation of its parking facilities may involve some incidental loss to private competitors constitutes no reason for holding that the act does not meet a legitimate public purpose. It is no constitutional objection to the statute which provides for the development of parking facilities "nor does it derogate from the public character of its objective, that the Authority will to some extent conduct what may heretofore have been regarded as a private enterprise; to hold otherwise would mean that the State would be powerless, within constitutional limitations, to act in order to preserve the health and safety of its people even though such action were imperative and vital for the purpose."

(quoting McSorley v. Fitzgerald, 359 Pa. 264, 270, 59 A.2d 142, 145-46 (1948)).

[25] The annual budget of Brighton, Michigan, a city of only approximately 2500, is nearly $1,000,000. It may therefore be considered inequitable to allow "the people" as a unit to compete with private individuals. Another possible reason is the belief that private enterprise ultimately provides better service at a lower cost. According to this view, tax dollars are not as efficient, in the long run, as the same funds privately spent to acquire the same service or commodity. A less theoretical rationale for applying this criterion is that judges and city administrators may simply fear or object to a socialistic trend which they may perceive as resulting from increasing governmental assumption of previously private services.

[26] Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958): "[T[he courts generally construe [public purpose] to mean such an activity as will serve as a benefit to

Some expenditures confer a direct and immediate benefit on all of a city's residents.[27] Other expenditures are of immediate benefit to only a few persons, with any benefit to the remainder of the city's residents being indirect or deferred.[28] Courts have commented that although the direct benefit is received by only a few, this does not necessarily invalidate a municipal expenditure. For example, in *Rindge Co. v. County of Los Angeles,*[29] the nature of an expenditure to build a road to, and ending upon, a privately owned ranch was at issue. The court held that the expenditure, despite the lack of widespread benefit, was nevertheless for a "public purpose."[30] Similarly, in *Beardsley v. City of Darlington,*[31] an expenditure for a television translator tower, designed to improve reception in some areas, was held valid despite the fact that not all residents of the city benefitted. However, there has never been any clearly delineated standard as to the number of beneficiaries required for an expenditure to be "public."

A final criterion sometimes mentioned is the necessity for the goods or services provided by the expenditure accompanied by

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the community as a body . . . ." *See also* Greensboro-High Point Airport Authority v. Johnson, 226 N.C. 1, 8-9, 36 S.E.2d 803, 809 (1946); Opinion to the Governor, 76 R.I. 249, 255, 69 A.2d 531, 534 (1949). In 7 OP. DETROIT CORP. COUNSEL 673 (1947), the Corporation Counsel determined that a proposed public expenditure to subsidize the transportation expenses of veterans was impermissible. "In all cases where the question of 'public purpose' has been introduced, the courts have considered the term to mean '*general* public purpose' for the benefit of *all* of the citizens of the state or municipality." *Id.* at 675 (emphasis added).

[27] Expenditures for water and sewage facilities, electrical power, and city parks confer a direct benefit on all the residents of the municipality, or at least on all who wish to use the facility or service. In the following cases expenditures for such purposes have been approved: White v. Mayor and Council, 119 Ala. 476, 23 So. 999 (1898) (lighting); Ragsdale v. Hargraves, 198 Ark. 614, 129 S.W.2d 967 (1939) (parks); Bank of Commerce v. Huddleston, 172 Ark. 999, 291 S.W. 422 (1927) (water facilities); Marin Water and Power Co., v. Town of Sausalito, 168 Cal. 587, 143 P. 767 (1914) (waterworks and electric lights); City of Colorado Springs v. Pikes Peak Hydro-Electric Co., 57 Colo. 169, 140 P. 921 (1914) (street lighting); Brandon v. County of Pinellas, 141 So. 2d 278 (Fla. App. 1962) (parks); Loring v. Commissioner of Public Works, 264 Mass. 460, 163 N.E. 82 (1928) (water supply); Wright v. Walcott, 238 Mass. 432, 131 N.E. 291 (1921) (parks); Kelley v. Merry, 262 N.Y. 151, 186 N.E. 425 (1933) (street lighting); Kraus v. City of Cleveland, 116 N.E.2d 779 (Ohio C.P. 1953) (water flouridation); Dickinson v. Salt Lake City, 57 Utah 530, 195 P. 1110 (1921) (sewage lines and drains).

[28] Expenditures to subsidize continuing education of municipal officers are not unusual, even though only the individual directly benefits. Interviews, *supra* note 10. However, cities may feel that the benefit to the individual eventually will result in indirect benefit to the cities in terms of more efficient service. *See, e.g.,* Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), where a law enforcement official was sent, at municipal expense, for specialized training to Washington, D.C., and the appropriation was upheld.

[29] 262 U.S. 700 (1922).

[30] The Court stated: "It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use." *Id.* at 707.

[31] 14 Wis. 2d 369, 111 N.W.2d 184 (1961).

the infeasibility of private provision of the items.[32] If private enterprise is unable or unwilling to provide a service or good and there is a need for it, there is a great likelihood that a municipal expenditure to finance provision of the service or good will be characterized as "public."[33] In order to satisfy this test, a very serious need for a service or commodity must exist, and it must fall to the city to perform by default; that is, there must be no expectation of private performance. Increased convenience to residents does not qualify as necessity.[34] Furthermore, the need must relate to the health or safety of residents. Lack of housing for persons who cannot afford decent shelter would qualify as a legitimate public need.[35] Physical disasters, such as fire, flood, and

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[32] In Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939), the court considered as a possible factor "whether a special emergency exists, such as may be brought about by war or public calamity." *Id.* at 293, 23 N.E.2d 668. Similarly, in Opinion to the Governor, 76 R.I. 249, 69 A.2d 531 (1949), it was said that a public purpose could be found when the government is

> furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide.

Id. at 255, 69 A.2d at 534. *See also* Opinion of the Justices, 320 Mass. 773, 67 N.E.2d 588 (1946); ANN ARBOR CITY CHARTER, ch. 8, § 8.17(i) (1956):

> In case of fire, flood, or other calamity, the Council may subject to law authorize the issuance of emergency bonds which shall be general obligations of the City for the relief of the inhabitants of the City and for the preservation of municipal property.

[33] All the municipal officials interviewed stated that recourse to the justification of necessity is common, particularly where the city charter explicitly approves emergency expenditures. Interviews, *supra* note 10. *Cf.* ANN ARBOR CITY CHARTER, ch. 8, § 8.17(i) (1956), *supra* note 32; DETROIT CITY CHARTER, tit. III, ch. 1, § 12(f) (1973):

> The legislative powers and duties of the [Common] Council shall be as follows; . . . To borrow money upon the faith and credit of the city upon bonds to be issued as herein prescribed; provided that in case of exigency involving the peace, health or safety of the people of the city, loans may be authorized without issuing bonds . . . .

See also 9 OP. DETROIT CORP. COUNSEL 90 (1955), where the city sought to determine whether wage increases would qualify as an "emergency" appropriation, so as to justify reopening the budget.

[34] In Ferrie v. Sweeny, 34 Ohio 272, 72 N.E.2d 128 (1946), convenience was the only justification advanced for offering publicly financed day care to children of financially able parents. The use was declared "private." "[T]he bestowal of care at public expense to children of those whose financial condition does not require it, is an expenditure of public funds for a private purpose." *Id.* at 133.

See also 9 OP. DETROIT CORP. COUNSEL 536 (1958), for a similar determination on identical facts, and 9 OP. DETROIT CORP. COUNSEL 167 (1966), where a proposal to subsidize the public transportation expenses of senior citizens was held improper:

> The use of tax monies to bestow a subsidized fare upon any persons whose financial condition does not require it as a part of poor relief is an expenditure of public funds for a private and not a public purpose. Such a procedure, we feel, would be found by the Courts to be an unjustified use of tax monies.

Id. at 167.

[35] *See* Opinion of the Justices, 297 Mass. 567, 8 N.E.2d 753 (1937). The court suggested that actual and demonstrable slum conditions coupled with a shortage of adequate

wind damage, and civil disorders leaving citizens homeless or without food would also satisfy the health and safety requirement.

These criteria, although used or mentioned by courts, fail to provide a needed objectivity in the determination of proper municipal expenditures. The reason that no objective standard has emerged is the lack of consistent application of the criteria and the significant disagreement as to their relative importance. Thus, a need exists for a thorough reevaluation of these criteria and a more definite statement of the meaning of the familiar phrase "public purpose."

II. SUGGESTED RELATIVE IMPORTANCE OF PARTICULAR CRITERIA

A. Prior Characterization

Courts and municipalities should give relatively little weight to prior characterization of an expenditure by other cities, courts, and commentators when considering the permissibility of an expenditure. Reliance upon approved past usage of public funds is of no avail when general characterization is either nonexistent or inconsistent. Past usage is also of little value when novel uses for public money are challenged, unless courts or cities are willing to limit public purposes to those for which prior appropriations have been approved.[36] For expenditures previously challenged in court, judicial precedent may aid a city in deciding whether a similar expenditure is permissible. However, lack of precedent or mechanical reliance on prior characterization may deter innovative, though proper, municipal expenditures. Furthermore, as one court put it, "views as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of govern-

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housing elsewhere would justify public housing projects. Slum clearance and low cost housing construction projects are commonly approved. *See, e.g.*, Rowe v. Housing Authority, 220 Ark. 698, 249 S.W.2d 551 (1952); People *ex rel* Gutknecht v. City of Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953); Miller v. City of Louisville, 321 S.W.2d 237 (Ky. 1959); Rutherford v. City of Great Falls, 107 Mont. 512, 86 P.2d 656 (1939); Lennox v. Housing Authority, 137 Neb. 582, 290 N.W. 451 (1940); Murray v. LaGuardia, 291 N.Y. 320, 52 N.E.2d 884 (1943); Ferch v. Housing Authority, 79 N.D. 764, 59 N.W.2d 849 (1953); State *ex rel.* Breustle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953); McNulty v. Owens, 188 S.C. 377, 199 S.E. 425 (1938); Knoxville Housing Authority v. City of Knoxville, 174 Tenn. 76, 123 S.W.2d 1085 (1939). *See also* Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912), in which a housing project was declared improper where the proposed occupants did not require financial assistance in securing housing.

[36] The officials interviewed, particularly those in the smaller cities, indicated that the absence of any precedent supporting an identical expenditure often has the practical effect of foreclosing consideration of the expenditure. Interviews, *supra* note 10.

ment, so that today there are familiar examples of such use which formerly would not have been so considered."[37] For example, a contribution for support of or participation in municipal leagues was once routinely held an improper private expenditure.[38] The prevailing attitude has changed, however, and now these expenditures are quite uniformly approved.[39] Appropriations for recreational or cultural facilities were also commonly classified as private uses;[40] many such expenditures are approved as proper public purposes today.[41] Ascertaining the past characterization of an expenditure may be just as difficult as the ultimate determination of its current propriety.[42]

Even if prior characterization of an expenditure has been consistent,[43] the importance accorded former determinations should

[37] Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 221, 200 A. 834, 840 (1938).

[38] *See, e.g.*, City of Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944); Town of Farmington v. Miner, 133 Me. 162, 175 A. 219 (1934); Waters v. Bonvouloir, 172 Mass. 286, 52 N.E. 500 (1899); and State *ex rel.* Thomas v. Semple, 112 Ohio St. 559, 148 N.E. 342 (1925).

Municipal leagues, such as the Michigan Municipal League, are voluntary statewide cooperative organizations composed of cities, villages, and other local governmental units. Their purpose is mutual benefit from the exchange of knowledge and expertise gained by city administrators. Regional organizations (*e.g.*, Southeastern Michigan Council of Governments) and national organizations (*e.g.*, National League of Cities) also exist. There are similar organizations composed of particular city officials or employees, for example, conferences of mayors or of city controllers. Interview with Mr. Robert Fryer, Director of the Michigan Municipal League, in Ann Arbor, Michigan, April 30, 1973.

[39] *See, e.g.*, City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948); City of Roseville v. Tulley, 55 Cal. App. 2d 601, 131 P.2d 395 (1942); People *ex rel.* Schlaeger v. Bunge Bros. Coal Co., 392 Ill. 153, 64 N.E.2d 365 (1945); Hays v. City of Kalamazoo, 316 Mich. 443, 25 N.W.2d 787 (1947); Tousley v. Leach, 180 Minn. 293, 230 N.W. 788 (1930); and State *ex rel.* McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951). Every state except Hawaii has a statewide municipal league organization, and the rate of participation in these organizations is typically very high. For example, in Michigan slightly over 98 percent of all incorporated cities and villages are dues-paying members of the Michigan Municipal League. Interview with Mr. Robert Fryer, Director of the Michigan Municipal League, in Ann Arbor, Michigan, April 30, 1973.

[40] *See, e.g.*, City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1 (1938) (It was held impermissible to own and operate a golf course.); Brooks v. Town of Brooklyn, 146 Iowa 136, 124 N.W. 868 (1910) (The construction and operation of an opera house was held impermissible.); Historical Pageant Ass'n v. City of Philadelphia, 260 Pa. 447, 103 A. 824 (1918) (It was an improper expenditure to subsidize a non-profit organization which presented public programs recalling important civic occurrences.).

[41] *See, e.g.*, Opinion of the Justices, 297 Mass. 567, 8 N.E.2d 753 (1937) (public memorial to sailors and a marine park); Rivet v. Burdick, 255 App. Div. 131, 6 N.Y.S.2d 79 (1938) (parks and toboggan slides); City of Greensboro v. Smith, 241 N.C. 363, 85 S.E.2d 292 (1955) (war memorials); City of Cleveland v. Lausche, 70 Ohio App. 273, 49 N.E.2d 207 (1943) (zoological garden); Sambor v. Hadley, 291 Pa. 395, 140 A. 347 (1928) (commemoration of the one hundred fiftieth anniversary of the signing of the Declaration of Independence); Hill v. Roberts, 142 Tenn. 215, 217 S.W. 826 (1920) (war memorials); and Goodnight v. City of Wellington, 15 S.W.2d 1071 (Tex. Civ. App. 1929) (establishment and maintenance of a city band).

[42] For an argument that the historical usage test is at best inconclusive where the public-private dichotomy determines tort liability, see Note, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

[43] Cases approving street lighting, for example, have been consistent. *See* White v.

be slight.[44] The reasoning underlying a prior characterization may be useful to a court in making a new determination, but mechanical application of prior case law should be avoided.[45] On the other hand, judicial recognition of a general usage may assist cities in assessing the likelihood of a challenge to a proposed expenditure.[46] Even if the appropriation is contested, its propriety should be determined without regard to the customary characterization of the expenditure.

B. Legislative or Voter Approval

Some courts believe that a formal legislative finding as to the public or private nature of an appropriation, or the submission of the issue to a popular vote, lends weight to the resulting determination. There seems to be confusion between a city's manifestation of intent to appropriate public money for a given purpose, and its capacity to legitimize the expenditure by its act of approval. Cities often appropriate money by resolution of the city council, by act of an executive officer, by a vote of the electorate, or by some combination of these devices. Implicit in approval of any expenditure is the decision-maker's wish to spend the money and belief that the expenditure is lawful. Nevertheless, an express desire to spend municipal funds in a particular way by no means assures that the use is "public." Ratification by formal findings or electoral results need not have any effect on the nature of the expenditure; the decision-maker cannot be wrong about the wish to spend the money, although he may be wrong about the permissibility of the expenditure.[47] The public purpose doctrine

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Mayor and Council, 119 Ala. 476, 23 So. 999 (1898); Kelley v. Merry, 262 N.Y. 151, 186 N.E. 425, *rev'g* 239 App. Div. 758, 263 N.Y.S. 282 (1933); City of Colorado Springs v. Pikes Peak Hydro-Electric Co., 57 Colo. 169, 140 P. 921 (1914); Carroll v. City of Cedar Falls, 221 Iowa 277, 261 N.W. 652 (1935); Waddle v. City of Somerset, 281 Ky. 30, 134 S.W.2d 956 (1939); Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965).

[44] Of those courts which have confronted the issue, most agree that favorable past usage is not essential to a finding of a "public" purpose. Several cases explicitly state that ". . . novelty should impose no veto" to a finding of permissibility. *See* Sun Printing & Publishing Ass'n v. City of New York, 40 N.Y.S. 607, 612, 8 App. Div. 230, 238 *aff'd*, 152 N.Y. 257, 46 N.E. 499 (1896); Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 221, 200 A. 834, 840 (1938).

[45] *See, e.g.*, Hood v. Mayor and Aldermen, 83 Mass. (1 Allen) 103, 106 (1861): "An unlawful expenditure of the money of a town cannot be rendered valid by usage, however long continued."

[46] The officials interviewed indicated that their confidence in the propriety of an expenditure is proportionate to the precedent and usage supporting the expenditure. Interviews, *supra* note 10.

[47] It is settled law that the determination by a city is not binding upon the courts. *See* notes 6-8 and accompanying text *supra* for illustrations of judicial correction of erroneous determinations. *See also* 8 OP. DETROIT CORP. COUNSEL 85 (1942), for an acknowl-

should be applied in a way that protects a citizen's freedom from taxation for expenditures which independent judicial scrutiny would disapprove. Therefore, the characterization of public expenditures should be independent of citizen reaction.

C. General Economic Benefit

General economic benefit is neither necessary nor sufficient for showing a public purpose. Many admittedly permissible expenditures result in no economic benefit,[48] while other expenditures which produce such a benefit are impermissible.[49]

Despite the inconclusiveness of the presence or absence of an economic benefit resulting from an expenditure, this factor could be given some role in evaluating the nature of an expenditure. If economic benefit were to assume much importance, however, there is danger that confusion about the ultimate issue to be resolved might result. Economic desirability is an important practical element in determining which expenditures are made,[50] but desirability and constitutionality are distinct concepts.[51] There is no apparent legal reason for prohibiting cities from making economically undesirable expenditures. This distinction between desirability and legality should be emphasized by confining the factor of economic benefit to a minor role in the determination of the permissibility of municipal expenditures.

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edgement that a determination by the City Council that an emergency exists, so as to justify extraordinary expenditures, is subject to review by the courts and is not conclusive. A similar opinion on the same issue is 9 OP. DETROIT CORP. COUNSEL90 (1955).

[48] No economic benefit is even indirectly apparent as a result of an appropriation for construction of a water flouridation plant, although health reasons might justify the expenditure. Kraus v. City of Cleveland, 116 N.E.2d 779 (Ohio C.P. 1953) (water flouridation expenses approved). Similarly, expenditures for many of the safety measures of a city are permitted even though they might fail to enhance the local economy. Mayor and Alderman v. Rumsey & Co., 63 Ala. 352 (1879) (fire equipment); Stewart v. Schoonmaker, 50 Kan. 573, 32 P. 913 (1893) (fire equipment); Tonn v. Strehlau, 265 Wis. 250, 61 N.W.2d 486 (1953) (fire equipment). Typically health and safety expenses consume a sizeable portion of a city's budgeted capital. For example, in Detroit's 1973-74 budget, the combined total allocations for the fire, police, health and sanitation departments accounted for $247,580,677, or almost 35% of the entire budget. Data from the 1973-74 Budget for the City of Detroit.

[49] *See* note 26 and accompanying text *supra*.

[50] *See* note 27 and accompanying text *supra*.

[51] This distinction was drawn by the Supreme Court when it disclaimed any authority to legislate policy while asserting its authority to prevent unconstitutional actions. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Court limited itself as follows: "It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system [as that set up under the NIRA codes of fair competition]. It is sufficient to say that the Federal Constitution does not provide for it." *Id.* at 549. *See also* Opinion to the Governor, 76 R.I. 249, 274, 69 A.2d 531, 543 (1949) (dissenting opinion):

> In more recent years, however, some courts appear to have adopted a

D. Competition With Private Enterprise

The term "competition" is so imprecise that any standard considering competition with private enterprise cannot be consistently applied without proscribing all municipal expenditures. "Competition" might be defined as only the displacement of a currently operating private enterprise, thereby causing it economic loss, but a municipality's usurpation of a private entrepreneur's future expansion market is also competition since the municipal activity bars private entry.[52] Thus any expenditure by a city that offers a service or good competes, in some sense, with private enterprise if a profit could be made by a private firm offering the same service or good. Unless the term competition is somehow limited, all municipal expenditures seem to compete improperly with the private sector.

In many cases judicial approval has been given municipal expenditures despite the presence of competition with private enterprise. One city permanently operated a fuel yard at cost, no doubt competing with private industry; the expenditure was upheld.[53] Furthermore, city-operated hospitals or health clinics compete with private hospitals and private physicians' offices, but challenges have not succeeded.[54] Municipal parking structures[55] are another common example of a municipally provided service that competes with privately offered services. The list could be extended.[56] Thus municipal expenditures are regularly approved by

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so-called "liberal" view by expanding the meaning and extending the application of "public use" so as to support the exercise of eminent domain in cases which would not reasonably come within the primary meaning of public use. Many of such decisions seem to me to confuse that which may be merely beneficial or desirable as a matter of public policy with the constitutional meaning of public use . . . .

[52] *See* P. SAMUELSON, ECONOMICS ch. 24–25 (5th ed. 1961).

[53] Laughlin v. City of Portland, 111 Me. 486, 90 A. 318 (1914).

[54] *See, e.g.*, Hamilton v. City of Anniston, 249 Ala. 479, 31 So. 2d 715 (1947); Lien v. City of Ketchikan, 383 P.2d 721 (Alas. 1963); State v. City of Fort Lauderdale, 149 Fla. 177, 5 So. 2d 263 (1941); People *ex rel.* Royal v. Cain, 410 Ill. 39, 101 N.E.2d 74 (1951); Finan v. Mayor and City Council, 154 Md. 563, 141 A. 269 (1928).

[55] *See, e.g.*, Brodhead v. City of Denver, 126 Colo. 119, 247 P.2d 140 (1952); Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523 (1953); Florida v. City of Jacksonville, 53 So. 2d 306 (Fla. 1951); Michigan Boulevard Bldg. Co. v. Chicago Park Dist., 412 Ill. 350, 106 N.E.2d 359 (1952); City of Detroit v. Wayne Circuit Judges, 339 Mich. 62, 62 N.W.2d 626 (1954); Parr v. Ladd, 323 Mich. 592, 36 N.W.2d 157 (1949); De Lorenzo v. City of Hackensack, 9 N.J. 379, 88 A.2d 511 (1952); State *ex rel.* Gordon v. Rhodes, 158 Ohio St. 129, 107 N.E.2d 206 (1952).

[56] In smaller cities, refuse collection is often contracted out to private companies. This is done in Brighton, Michigan. Interviews, *supra* note 10. If the city were to institute its own garbage collection service, the necessary expenditure would be proper, despite the obvious resultant competition. People *ex rel.* Toman v. New York Central Lines, 380 Ill. 581, 44 N.E.2d 549 (1942) (garbage collection expenses approved). Similarly, Detroit owns and operates a power generating system for lighting public streets and buildings. This municipal system diminishes the market of Detroit Edison Company, the principle private power supplier. Interviews, *supra* note 10.

courts in spite of possible public competition with private enterprise.

E. Number of Beneficiaries

This criterion deserves increased importance in determining permissible public expenditures. Two questions arise when considering the number of beneficiaries: who are the relevant beneficiaries and what types of benefits are germane.

Courts frequently assume without explanation that benefit from an expenditure is proper only if the beneficiaries are residents of the city or persons within its confines for whom it is responsible.[57] The assumption seems correct, for the underlying premise of municipal incorporation is that this governmental form best pools the resources of the city's residents and most efficiently manages them for the provision of necessary or helpful community services. Charters of incorporation generally embody this assumption.[58]

An expenditure may be "public" even though only a portion of the city's residents are benefitted. The first justification for such an expenditure is that, in some cases, the entire community has a special interest in seeing a few residents benefitted. For example, the beneficiaries may be public officials or employees in direct service to the entire community.[59] Special police or detective

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[57] *E.g.*, Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958): "[T]he courts generally construe [public purpose] to mean such an activity as will serve as a benefit to the community as a body . . . ." Greensboro-High Point Airport Authority v. Johnson, 226 N.C. 1, 8-9, 36 S.E.2d 803, 809 (1946):

> "Public Purpose" as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of *its inhabitants and others coming within the municipal care*. [Emphasis added.]

[58] ANN ARBOR CITY CHARTER (1956), Preamble:

> *We*, the People *of the City of Ann Arbor*, in order to secure the benefits of efficient *self* government and otherwise to promote *our* common welfare, do ordain and establish this charter for the government of our city. [Emphasis added.]
>
> [T]he City shall have the power . . . to do any acts to advance the interests, good government, and prosperity of the City *and its inhabitants*, and general welfare. [Emphasis added.]

Id. ch. 3, § 3.1.

[59] Many cases involve municipal payment of legal fees of public officials. The only direct beneficiary is the official, but the entire community has an interest in paying the defense costs to encourage qualified men to seek or accept public office. *See, e.g.*, Miller v. Carbonelli, 80 So. 2d 909 (Fla. 1955); Whelan v. Town of Hingham, 348 Mass. 402, 204 N.E.2d 118 (1965); Chandler v. Saenz, 315 S.W.2d 87 (Tex. Civ. App. 1958); and Cheesebrew v. Town of Point Pleasant, 71 W. Va. 199, 76 S.E. 424 (1912). If the matter litigated did relate to improper use of official power, then the community's interest is quite different. *See, e.g.*, State *ex rel.* Flagg v. City of Bedford, 2 Ohio App. 2d 300, 304, 208

training for law enforcement officials is an instance of direct benefit to a few persons because they provide services to the community.[60] Municipal assistance to veterans, often in the form of housing subsidization,[61] has also been characterized as aid to persons serving the community. The second justification for expenditures which directly benefit only a part of the entire community is that the remainder of the community has been or will be similarly benefitted. City-funded special-interest programs of limited appeal may be justified as part of a series of special-interest programs covering the whole range of concerns of the city's residents.[62] For example, bookmobiles and mobile swimming pools would qualify if their locations were changed to canvass the entire community. New services may be inaugurated in steps, benefitting only a few at first.[63] Thus, although the benefit derived

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N.E.2d 146, 149 (1956): "Private obligations unconnected with the services required of an officer or employee of a municipality in furtherance of the duties of his office or employment cannot be assumed, even if so directed by the legislative authority." In *Flagg*, the mayor induced the papers to print an alleged libel of the city's former director of law. *See also* Peet v. Leinbaugh, 180 Iowa 937, 164 N.W. 127 (1917) (Mayor may not recover legal expense of suing for compensation he was not entitled to receive.); Kilroe v. Craig, 208 App. Div. 93, 203 N.Y.S. 71 (1924) (Former assistant district attorney was not entitled to reimbursement for legal fees incurred in defending himself from a charge of misconduct in office.); and City of Del Rio v. Lowe, 111 S.W.2d 1208 (Tex. Civ. App. 1937) (Commissioners could not recover expenses for defense from offenses alleged to have been committed by them against the city.).

[60] *E.g.*, Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), where a town spent public funds to send a police officer to the National Police Academy and the expenditure was upheld. The more frequent expenditures which benefit persons serving the city are pension and disability assistance to city employees. Such expenditures are routinely approved. *See, e.g.*, Adamson v. City of Little Rock, 199 Ark. 435, 134 S.W.2d 558 (1939) (pensions for firemen); and Hammitt v. Gaynor, 82 Misc. 196, 144 N.Y.S. 123, (Sup. Ct. 1913) (pensions for all city workers).

[61] The following cases approved municipal expenditures to provide special housing benefits to veterans: City of Phoenix v. Superior Court of Maricopa County, 65 Ariz. 139, 175 P.2d 811 (1946); Franco v. City of New Haven, 133 Conn. 544, 52 A.2d 866 (1947); Opinion of the Justices, 320 Mass. 773, 67 N.E.2d 588 (1946); and Ferch v. Housing Authority, 79 N.D. 764, 59 N.W.2d 849 (1953).

In some instances, as in Opinion of the Justices, *supra*, a finding that a housing shortage exists also may have justified the expenditures on necessity grounds. *See* note 40 and accompanying text *supra*.

[62] *E.g.*, Lewis v. LaGuardia, 172 Misc. 82, 14 N.Y.S.2d 463 (1939), which approved city financing of radio broadcasts of speeches with religious overtones made by prominent persons at "Communion Breakfasts." The court conceded that the interest in hearing any given speaker might be slight, but found that the series as a whole appealed to much of the listening public.

[63] There ought to be a special concern when the beneficiary group comprises less than the entire population of the city and when a fee is charged for the service or commodity to partially offset its cost. If an expenditure results in offering a service or good for a price, four requirements might be imposed: 1) The price must reasonably reflect the cost of the service or good; the city is not chartered to make money, but to serve its residents. 2) The commodity or service must be available to all residents on equal terms, without discrimination as to race, duration of residence in the city, or income. 3) The price charged must be within the economic means of a large proportion of the community. For example, an expenditure to develop a pleasure-boat marina would be impermissible if the only users were those who could pay a large rental fee for a boat slip. 4) If the demand outruns the

from municipal expenditures must primarily accrue to the residents of the city, there is no requirement that all residents directly benefit from a given expenditure.

The more difficult question is what types of benefits are relevant to a determination of an expenditure's nature. Economic or material advantages are the usual benefits to city residents from municipal expenditures,[64] but "benefit" could embrace more than economic or physical advantage. Satisfaction from fulfilling a perceived moral duty is also of value and may be desired by city residents. Public expenditures can even satisfy spiritual and emotional needs of the citizenry. Whether these psychological benefits should be cognizable in the characterization of municipal expenditures rarely has been considered.

Some types of nonmaterial benefits might be excluded from consideration on either of two grounds. First, certain types of benefits are more easily verifiable than others. Material benefits are physically observable; economic improvements are reflected in property assessments, tax reductions, or business receipts. Aesthetic enjoyment from gazing at a park fountain or from listening to the city symphony is more difficult to gauge, but the number of gazers or concert-goers may indicate the benefit derived. In contrast, some benefits such as the satisfaction of performing a perceived moral duty, result in no obvious objectively verifiable benefit. For example, moral considerations might underlie a request to a city council to make a good will contribution to aid natural disaster victims or war refugees of foreign countries. Thus, where benefits from municipal expenditures are difficult or impossible to verify, the expenditures could be labeled "private."

A second factor, as a practical matter, excludes certain expenditures for nonmaterial benefits from judicial consideration. This is the principle that an expenditure will be characterized on the basis of the primary or principal intended benefit.[65] Theo-

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supply of the commodity or service, then availability must recur at reasonable intervals; there must be some assurance that the expenditure will not exclusively benefit the few who, by chance, are the first to receive its advantage.

[64] *See* notes 26-27 and accompanying text *supra*.

[65] *See, e.g.*, Port Authority v. Fisher, 269 Minn. 276, 132 N.W.2d 183 (1964), where the court stated:

> The mere fact that some private interests may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public. On the other hand, *if the primary object is to promote some private end, the expenditure is illegal, although it may incidentally also serve some public purpose.*

Id. at 288, 132 N.W.2d at 192 (emphasis added). Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 292-93, 23 N.E.2d 665, 667 (1939): "[T]he cases tend to distinguish between those results which are primary and those which are secondary or incidental and to classify the object according to its primary consequences and effects."

retically this restriction disfavors no particular type of benefit, but as a practical matter, cities rarely spend money where the primary intended benefit is nonmaterial. When expenditures for nonmaterial benefits are made, they should, of course, receive due consideration by the courts, even though such spending is usually an insignificant part of a city's budget. These two factors may justify excluding the satisfaction of felt moral duties from the category of relevant benefits.

The number of beneficiaries of an expenditure should be given increased importance by the courts and cities. This criterion should be modified, as outlined above, to require that all the city's residents benefit roughly equally from the expenditure, or at least that the benefit be available to each resident on roughly equal terms. If inequality exists it should be justified by limited special circumstances.

F. Necessity and Infeasibility of Private Performance

The problem with the necessity criterion is that it might negate any other limitation on municipal spending if it could be too easily invoked. To keep the use of necessity as a justification within some confines, cities could be required to declare formally the emergency at the time of the expenditure, stating with particularity the factual data underlying the determination. This formal declaration would enable reviewing courts to compare the actual needs of similarly situated municipalities. An open and thorough factual evaluation is an uncertain check on abuses, but it may be the only sensible check available.

If the restrictions on declaring an emergency and presenting the underlying factual data are enforced, the necessity criterion may be a workable indicator of proper public spending, giving cities the leeway to make extraordinary disbursements when warranted by the needs of their residents.

III. CONCLUSION

In the past, the standards used by the courts and cities to determine the public or private character of municipal expenditure have been neither clearly articulated nor consistently applied. The

See also 15 E. MCQUILLIN, *supra* note 5, at 31: "However, if the primary object is to subserve a public municipal purpose, it is immaterial that, incidentally, private ends may be advanced."

test may have been the satisfaction of some combination of the six criteria discussed in this article. Only two of the criteria—the number of beneficiaries and the necessity of the expenditure—have a proper role in determining the permissibility of municipal expenditures. Emphasis on the number of beneficiaries should be the central element in a more open and consistent approach to the question. The notion of necessity, properly safeguarded, can provide the flexibility required for the system of municipal appropriations.

Nevertheless, it must be emphasized that determining the issue consistently and objectively should be valued more highly than utilizing any particular relative weighting given to the different factors. Although mistakes may be made by openly emphasizing the wrong elements, at least there will be some basis on which to evaluate the determinations and to discover the mistakes. Formulating a rational and critical procedure for determining public purpose is indeed difficult, but that is no reason to despair of attempting to devise one.

—*Richard A. Van Wert*